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In The

Supreme Court of the United States

WILLIAM JOSEPH HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

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QUESTION PRESENTED

Given that a finding of "brandishing," as used in 18 U.S.C. § 924(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of "brandishing" be alleged in the indictment and proved beyond a reasonable doubt?

PARTIES TO THE PROCEEDING

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STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals was entered on March 20, 2001. The Court granted the Petition for Writ of Certiorari on December 10, 2001. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property without due process of law. . . .

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation. . . .

18 U.S.C. § 924(c)(1)(A)

[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

STATEMENT OF THE CASE

The issue in this case is whether the district court properly increased Petitioner's mandatory minimum sentence from five years to seven years based upon a finding, made only at sentencing and by a slim preponderance of the evidence, that Petitioner had "brandished" his weapon in violation of 18 U.S.C. § 924(c)(1)(A)(ii). This critical fact was not charged in the indictment and not proved at trial beyond a reasonable doubt. The Court's recent holdings in *Apprendi v. United States*, 530 U.S. 466 (2000), *Jones v. United States*, 526 U.S. 227 (1999) and *Castillo v. United States*, 530 U.S. 120 (2000) demonstrate plainly that both the statute and the Constitution require more. Petitioner was entitled to proper

notice in the indictment and the opportunity to challenge, in the crucible of an adversarial trial, the prosecution's evidence that he had brandished a weapon with an intent to intimidate, prior to being sentenced to an immutable term of seven years' duration.

Background

Petitioner owned and operated a pawn shop in Albemarle, North Carolina. (JA 74). Like most pawn shop owners, Petitioner regularly – and lawfully – wore an unconcealed gun during business hours, but took it off every night before leaving the shop. (JA 78-82, 163). On the afternoon of April 29, 1999, an undercover agent entered the pawn shop with Rodney Deaton, a confidential informant who is Petitioner's half brother, to purchase marijuana from Petitioner. (JA 38, 41). The three men spent thirty minutes in casual conversation before negotiating the sale of one ounce of marijuana. (JA 46-47). After the sale was complete, the informant, Deaton, noticed the gun in Petitioner's hip holster and asked about it. (JA 49). After further inquiries from both Deaton and the agent, Petitioner removed the gun from his holster and explained that it had a high-capacity magazine and used bullets that could pierce a police officer's armored jacket. (JA 49-50). The three men examined the gun, then Deaton and the agent left the shop.

The agent returned by himself on April 30 and May 6 to purchase more marijuana. (JA 55, 58). On each occasion, the shop was open for business, and Petitioner was wearing the gun in his holster. (JA 55, 59). Neither man mentioned the gun again, and Petitioner never removed

it from his holster. (JA 55-58). The agent purchased four ounces of marijuana on April 30, and three-and-a-half ounces on May 6. (JA 56-57). He also purchased one gram of what was believed to be opium and two diazepam tablets on the latter date. (JA 64)

Petitioner was later arrested and charged with two counts of distribution of marijuana under 21 U.S.C. §§ 841(a)(1) & (b)(1)(D) and two counts of "carry[ing]" a firearm "in relation to" a drug trafficking crime under 18 U.S.C. § 924(c)(1)(A). (JA 4-6). The indictment did not charge that Petitioner had brandished the gun, nor did it charge him with any crime pertaining to the events of April 29. Prior to trial, the prosecution dismissed one distribution count and one firearm count, and Petitioner pleaded guilty to the remaining distribution charge. (JA 9-23). He disputed the remaining firearm count, however, and after waiving his right to a jury, he was tried before a judge. (JA 23-25). Despite only meager evidence that Petitioner had carried a firearm "in relation to" a drug trafficking crime, the judge found him guilty under § 924(c)(1)(A). (JA 163-64).

The presentence report recommended that Petitioner be given zero to six months in prison for the distribution charge. (PSR 11). The report also recommended that he be sentenced to a mandatory minimum sentence of seven years on the firearm count. *Id.* Although the mandatory minimum sentence for carrying a firearm during a drug-related crime under § 924(c)(1)(A) is five years, the report relied on § 924(c)(1)(A)(ii), which increases the mandatory minimum sentence to seven years when the firearm is brandished. *Id.* The report did not explain why Petitioner should be subject to this higher sentence.

Petitioner disputed the report's recommendations. He argued that brandishing is an element of a separate offense under § 924(c)(1)(A) and therefore must be charged in the indictment and proved beyond a reasonable doubt. (JA 198-205, 222). The judge disagreed. (JA 226, 233, 244-47). Petitioner also argued that he had not brandished a firearm during the drug sale because he had not displayed it "in order to intimidate" another person.[1] (JA 219-22). Repeatedly acknowledging that it was a "close case" and that "the only thing that happened here is he had [the gun] during the drug transaction," the judge nonetheless found by a preponderance of the evidence that Petitioner had brandished a firearm under § 924(c)(1)(A)(ii). (JA 232, 244-47). Although the judge initially indicated that he would not consider Petitioner's comments regarding the gun's ammunition because they were made in response to inquiries from Deaton and the undercover agent, the judge then cited that conversation as primary support for his decision. (JA 217, 240). He sentenced Petitioner to two days time served on the distribution count and seven years on the firearm count. (JA 247).

On appeal, Petitioner renewed his arguments that he had not brandished a firearm and that brandishing is an element of a separate offense that must be charged in the indictment and proved beyond a reasonable doubt. The

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[1] Under 18 U.S.C. § 924(c)(4), " 'brandish' means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person."

Fourth Circuit rejected both claims. *See* Pet. App. B. The court of appeals ruled that brandishing is not an element of a separate offense, but merely a penalty enhancement. *Id.* at 10. In reaching this decision, the Fourth Circuit relied on the structure of § 924(c)(1)(A) and the legislative history of its enactment. *Id.* at 7-10. The court also relied on this Court's decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Pet. App. B at 4-6. The court of appeals affirmed on the basis that the trial judge had not clearly erred in finding that Petitioner brandished the gun. *Id.* at 10 n.7.

SUMMARY OF ARGUMENT

This case is governed by *Jones*. The statute at issue here, 18 U.S.C. § 924(c)(1)(A), is identical in its structure to the statute that was at issue in that case, 18 U.S.C. § 2119. In *Jones*, the Court held that the particular facts specified in the separate subsections of the statute (*e.g.*, causing serious bodily injury) had to be pled in the indictment and proved to a jury beyond a reasonable doubt, consistent with the defendant's constitutional due process and jury trial rights. Here, not only is the structure of § 924(c)(1)(A) indistinguishable from that in *Jones*, but the legislative history even more plainly indicates that Congress intended to create separate criminal acts with increasingly severe punishments, rather than mere sentencing factors. In addition, both the federal government and the States have traditionally treated both brandishing and discharging as offense elements. Should the Court be unpersuaded by this evidence and conclude that

the statute is ambiguous, the rule of lenity and the doctrine of constitutional avoidance mandate that the Court resolve this ambiguity in Petitioner's favor.

Even if the Court disagrees with Petitioner's statutory analysis, the Constitution requires that brandishing and discharging be treated as offense elements. In *Apprendi v. United States*, 530 U.S. 466, 490 (2000), the Court held that " 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' " must be submitted to a jury and established by proof beyond a reasonable doubt. Although *Apprendi* involved an increase beyond the statutory maximum sentence and this case involves an increase in the mandatory minimum sentence, the protections of the Fifth and Sixth Amendments cannot turn on this distinction. When a judge makes a finding that increases the mandatory minimum sentence, the defendant's loss of liberty and the stigma of the conviction are heightened in the same fashion as when a judicial finding increases the statutory maximum sentence. Moreover, courts have not traditionally distinguished between factors that increase the statutory maximum sentence and those that increase the mandatory minimum sentence. Lastly, if the Court does distinguish between increases in statutory maximum sentences and increases in mandatory minimum sentences, it will create a vast loophole by which legislatures could evade the requirements of the Fifth and Sixth Amendments simply by raising the statutory maximum sentences for certain crimes to life in prison and then creating a range of punishments based on various factors.

ARGUMENT

I. THE STATUTE REQUIRES THE PROSECUTION TO CHARGE BRANDISHING IN THE INDICTMENT AND PROVE IT TO A JURY BEYOND A REASONABLE DOUBT.

Title 18 of the United States Code, section 924(c)(1)(A), imposes increasingly steep penalties for increasingly severe acts. Whether a defendant receives one sentence or another twice as severe depends on the rigorous proof at trial of all essential elements of the offense.[2]

Any other interpretation is contrary both to the language and structure of the statute, the traditional treatment of such provisions, the intent of Congress, and constitutional principles.

A. This Court In *Jones* Has Already Held That An Identical Statute Sets Forth Elements Of The Offense, Not Sentencing Factors.

Section 924(c)(1)(A) provides as follows:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in

[2] The constitutional issue in this case – that elements of the offense must be charged in the indictment and proved to a jury beyond a reasonable doubt – is not altered by the fact that Petitioner elected to waive his Sixth Amendment right to a jury trial and instead proceeded with a bench trial. The key fact is that brandishing was never alleged and never proved beyond a reasonable doubt.

> furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.[3]

The Fourth Circuit interpreted the division between the first paragraph and the subsections to be a dividing line between offense elements and sentencing factors. As a result, it concluded that using, carrying, and possessing are the only offense elements, while brandishing and discharging are "sentencing factors limiting the judge's discretion when sentencing those convicted of the crime."

[3] Although only the brandish provision of § 924(c)(1)(A)(ii) is directly at issue in this case, the discharge provision of § 924(c)(1)(A)(iii) must necessarily receive the same construction. The two provisions are listed in parallel subsections of § 924(c)(1)(A) and differ only in the type of conduct they describe and the punishment they carry. As a result, if one qualifies as an offense element, the other must as well. *See Jones*, 526 U.S. at 233 (treating parallel subsections as equivalent for purposes of determining whether the statute sets forth offense elements or sentencing factors); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (courts should read statutory provisions "in their context and with a view to their place in the overall statutory scheme" so as to "interpret the statute as a symmetrical and coherent regulatory scheme" (internal citations omitted)).

Pet. App. B at 7. This structural analysis has already been rejected by the Court in *Jones v. United States*, 526 U.S. 227 (1999), with regard to a nearly identical statute.

In *Jones*, the defendant was convicted of carjacking under 18 U.S.C. § 2119(2) (1988 ed., Supp. V.), which reads:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall –
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

The indictment did not charge that serious bodily injury had resulted, and the issue was never put to proof before the jury. Nonetheless, the judge sentenced the defendant to twenty-five years pursuant to subsection (2). This Court reversed the defendant's sentence, holding that the "serious bodily injury" provision of § 2119(2) is an element of the underlying offense rather than a sentencing factor, and thus, must be charged in the indictment and proved beyond a reasonable doubt. *Jones*, 526 U.S. at 252.

Although "at first glance [§ 2119] has a look to it suggesting that the numbered subsections are only sentencing provisions," *id.* at 232, the Court rejected this "superficial impression" for several reasons. First, it noted that subsections (2) and (3) "not only provide for steeply higher penalties, but condition them on further facts (injury, death) that seem quite as important as the elements in the principal paragraph (*e.g.*, force and violence, intimidation)." *Id.* at 233. Second, the Court pointed out that the first paragraph, standing by itself, "would merely describe some very obnoxious behavior, leaving any reader assuming that it must be a crime, but never being actually told that it is." *Id.* It is the numbered subsections that "complete the thought" and make clear that what is being described is a crime. *Id.* Third, the Court rejected the government's claim that the word "shall" divided the "offense-defining provisions from those that specify sentences." *Id.* Although the word "shall" often serves this function in federal statutes, the Court explained, "it hardly does so invariably." *Id.* at 234. And given that the clause in § 2119 before the word "shall" was "grammatically incomplete," the Court declined to give any significance to the placement of "shall" in the statute. *Id.*

The Court's analysis of the text in *Jones* applies with equal force here. First, the numbered subsections of § 924(c)(1)(A) provide for steeply higher penalties conditioned on further facts (brandishing and discharging a firearm) that seem just as important as the facts described in the first paragraph (using, carrying, and possessing a firearm). Indeed, the seven-year sentence for brandishing a firearm is forty percent longer than the lower five-year

sentence for using, carrying, or possessing, and the ten-year sentence for discharging fully doubles that sentence. *See Castillo v. United States*, 120 U.S. 120, 131 (2000) (noting that when the presence or absence of a particular fact dramatically affects the length and the severity of the sentence, it is appropriate to "assume a preference for traditional jury determination of so important a factual matter."). Second, the first paragraph of the statute describes obnoxious behavior, but does not state explicitly that this behavior is a crime. It is only the numbered subsections (i), (ii), and (iii) that "complete the thought" and make clear that what is being described is a punishable offense. Third, the placement of the word "shall" between the first paragraph and the numbered subsections has no significance given that the first paragraph is "grammatically incomplete" without the subsections that follow. Thus, as in *Jones*, the text of the statute demonstrates that the statute sets forth offense elements rather than sentencing factors.[4]

The Court in *Jones* buttressed its inferences from the statute's structure by looking at how the States and Congress had traditionally treated the infliction of "serious bodily injury." The Court found that, although Congress had occasionally treated the type of injury caused as a sentencing factor, it had "unmistakably identified serious bodily injury as an offense element in any number of

[4] The Court's statutory analysis in *Jones* did not turn on the fact that a finding of serious bodily injury increased the penalty beyond the statutory maximum sentence. Therefore, it makes no difference that brandishing and discharging, if proved, result in an increase in the statutory minimum sentence. The two statutes are structurally the same.

statutes," including the federal robbery statutes upon which § 2119 was modeled. 526 U.S. at 235-36. The Court also found that "[m]any States use causation of serious bodily injury or harm as an element defining a distinct offense of aggravated robbery." *Id.* at 236. This evidence, the Court held, strongly suggested that Congress intended for "serious bodily injury" to be an offense element. *Id.* at 237.

In this case, there is even more powerful evidence that the factors at issue have traditionally been treated as offense elements by Congress and the States. In at least four federal statutes, discharging a firearm is an offense element that must be charged in the indictment and proved beyond a reasonable doubt. *See* 40 U.S.C. § 193f(a)(1)(B) (criminalizing the discharge of a firearm on Capitol grounds); *id.* § 13j (criminalizing the discharge of a firearm in the Supreme Court building); 2 U.S.C. § 167d (criminalizing the discharge of a firearm in the Library of Congress); 18 U.S.C. § 922(q)(3)(a) (criminalizing the discharge of a firearm in a school zone). *See* Pet. App. D. Petitioner is not aware of any federal statute that treats discharging a firearm as a mere sentencing factor.[5] As for the States, nearly every one has at least one statute

[5] Certain definitions within federal criminal statutes show that Congress has traditionally treated brandishing as an element of the offense. For example, 18 U.S.C. § 3559(c)(2)(A) defines the term "assault with intent to commit rape" as "an offense that has as its elements engaging in physical contact with another person or using or brandishing a weapon against another person." This indicates that Congress considered "brandishing" a weapon to be an element of an offense separate from "using" a weapon.

that criminalizes the discharge of a firearm, while many have more than one such statute. In all, Petitioner has identified 210 state statutes in which discharging a firearm is an explicit element of a criminal offense. *See* Pet. App. E. In addition, at least eleven States have statutes in which "brandishing a firearm" is either a crime itself or an element of a crime. *See* Pet. App. F.[6]

The Court need look no further than the text and structure of the statute, the historical treatment of brandishing and discharging, and its opinion in *Jones* to resolve this case. If any doubts remain, however, they are resolved by a review of the legislative history of the statute, which demonstrates that brandishing and discharging are elements of the offense.

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[6] In *Castillo v. United States*, 530 U.S. 120, 126 (2000), the Court noted that "[t]raditional sentencing factors often involve . . . special features of the manner in which a basic crime was carried out (*e.g.*, . . . brandish[ing] a gun)." The Court's passing reference to brandishing in that context cannot negate the strong evidence that brandishing has traditionally been treated as an offense element. In *Castillo*, the issue before the Court was not whether brandishing was a traditional sentencing factor. Indeed, the opinion cites no State or federal provision treating the brandishing of a gun as a sentencing factor. Rather, the Court was simply stating that traditional sentencing factors often involve the manner in which a basic crime is carried out, and brandishing was nothing more than an example of what the Court meant.

B. The Legislative History Of The 1998 Amendment To § 924(c) Confirms That Congress Intended Brandishing A Firearm To Be An Element Of The Offense.

The legislative history of the 1998 amendment to § 924(c), which resulted in the current version of the statute, establishes that Congress intended the brandishing and discharging of a firearm to be elements of the offense. This intent is evident both in what the legislative history says and in what it does not say.

The 1998 amendment of § 924(c) is central to the analysis of the current version of the statute. There is no dispute that the use of a firearm under the prior version of this statute was an element of the offense that had to be charged in the indictment and proved to a jury beyond a reasonable doubt. Furthermore, it is clear that the word "uses" incorporated situations in which a defendant brandished or discharged a firearm. *See Bailey v. United States*, 516 U.S. 137, 148 (1995) (defining the word "uses" to include "brandishing" and "firing or attempting to fire a firearm"). Thus, under the earlier version of § 924(c)(1), any type of use, including brandishing and discharging, was an element of the offense.

Respondent's interpretation of the current version of § 924(c) then necessarily means that the 1998 amendment made a fundamental change to the statute by converting brandishing and discharging from offense elements to sentencing factors. This Court, however, has been reluctant to infer that Congress intended to make fundamental changes in statutes without an express indication, in the legislative history or otherwise, that this is what

Congress intended. *Jones*, 526 U.S. at 234 ("[it is a] fair assumption that Congress is unlikely to intend any radical departure from past practice without making a point of saying so"); *see also Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979) ("[S]ilence [in legislative history] . . . while contemplating an important and controversial change in existing law is unlikely."); *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613-14 (1991) (stating that an amendment to the National Labor Relations Act had been intended to make an "important" change, the Court "would expect to find some expression of that intent in the legislative history").

Here, the legislative history gives no indication that Congress intended to convert brandishing and discharging from offense elements to mere sentencing factors. To the contrary, the legislative history reveals that Congress had two principal purposes in amending § 924(c): to expand the scope of the criminal prohibition in the statute to include the mere possession of a firearm, and to increase certain penalties under the statute. Moreover, statements in the legislative history provide affirmative evidence that Congress understood brandishing and discharging to be offense elements.

1. Congress amended § 924(c) in direct response to this Court's opinion in *Bailey v. United States*.

Congress began the process of amending § 924(c) in 1996 in response to this Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995). In *Bailey*, the Court interpreted an earlier version of § 924(c), which read:

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years. . . .

18 U.S.C. § 924(c)(1) (1994). The courts of appeals had read the "uses or carries" clause expansively, to include situations in which a defendant had a gun readily accessible but did not actually use it.[7] The Court disagreed. It concluded that mere possession was insufficient to establish criminal liability, and held that a defendant must instead actively employ a firearm. 516 U.S. at 143. "Had Congress intended possession alone to trigger liability under § 924(c)(1)," the Court stated, "it easily could have so provided." *Id.*

In direct response to *Bailey*, Congress undertook to provide just that, and immediately began to propose amendments to § 924(c).[8] Congress' purpose from the

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[7] *See, e.g., United States v. Long*, 905 F.2d 1572, 1576 (D.C. Cir. 1990); *United States v. Plummer*, 964 F.2d 1251, 1255 (1st Cir. 1992); *United States v. Meggett*, 875 F.2d 24, 29 (2d Cir. 1989); *United States v. Paz*, 927 F.2d 176, 179 (4th Cir. 1991); *United States v. Featherson*, 949 F.2d 770, 776 (5th Cir. 1991); *United States v. Torres-Mediana*, 935 F.2d 1047, 1049 (9th Cir. 1991); *United States v. Hager*, 969 F.2d 883, 889 (10th Cir. 1992); *United States v. Poole*, 878 F.2d 1389, 1393 (11th Cir. 1989).

[8] Bills introduced in the 104th Congress included S. 1612, S. 1945, and H.R. 125. Other bills introduced in the 105th Congress included S. 3, S. 15, S. 43, S. 362, S. 602, S. 2484, H.R. 424, H.R. 2340, H.R. 3155. The bill that the 105th Congress eventually passed was S. 191. It is appropriate to consider the entire

outset, then, was not to downgrade brandishing and discharging to sentencing factors, but rather to include mere possession as an additional element that would trigger liability under the statute.

When introducing S. 43, for example, Senator Helms made the following comment:

> The Court, in *Bailey versus United States*, interpreted the law to require that a violent felon actively employ a firearm as a precondition of receiving an additional five year sentence.
>
> . . .
>
> The Supreme Court, recognizing the consequences of its decision, issued this invitation to us: "Had Congress intended possession alone to trigger liability * * * it easily could have so provided." That, Mr. President, is precisely the intent of this legislation – to make clear that possession alone does indeed trigger liability.

143 Cong. Rec. S379-01, S405 (daily ed. Jan. 21, 1997).

Likewise, Senator Leahy stated in his introduction of S. 362:

> In *Bailey v. United States*, the Supreme Court put a restrictive interpretation of the verb "use" in relation to a firearms violation under 18 U.S.C. § 924(c). . . . The legislative proposal

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legislative record where, as here, the statute is the product of several years of congressional consideration. *See, e.g., Hodel v. Virginia Surface & Mining & Reclamation Ass'n*, 452 U.S. 264, 278-80 & n.19 (1981) (relying on a legislative record compiled over six years).

> makes it clear that the statute punishes possession of a firearm, as well as its "use."

143 Cong. Rec. S1659-03, S1663 (daily ed. Feb. 26, 1997) (citations omitted).

Senator Hatch, who introduced the bill that was ultimately enacted, also made clear that the purpose of the measure was to respond to the Court's decision in *Bailey*, stating, "[t]oday, we are reviewing the impact on Federal drug and violent crime prosecutions of the Supreme Court's 1995 decision in *Bailey v. United States*. . . . This hearing will examine the impact of this decision and help us to assess the need for corrective legislation." *A Bill to Throttle Criminal Use of Guns: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. 1 (1997) (statement of Sen. Hatch, Chairman, Senate Committee on the Judiciary); *see also id.* at 5 (statement of Sen. Sessions) (the legislation would "mov[e] us back to the established law that we had before the *Bailey* decision"); *id.* at 2 (statement of Sen. DeWine); *id.* at 3-4 (statement of Sen. Helms); *id.* at 19 (statements of Sens. Kennedy & Thurmond).

Numerous other legislators expressed a similar understanding of the purpose behind the various proposals. Representative Gilman said "this legislation will allow Federal prosecutors to apply the mandatory sentence even if the criminal does not fire or brandish the weapon." 143 Cong. Rec. E80-03, E80 (daily ed. Jan 9, 1997). *See also* 144 Cong. Rec. H530-02, H531 (daily ed. Feb. 24, 1998) (statement of Rep. McCollum); 144 Cong. Rec. H10329-01, H10330 (Oct. 9, 1998) (statements of Reps. McCollum & Myrick); H.R. Rep. No. 105-344, at 4

(1997). Ultimately, the bill that passed, S. 191, became known as the "*Bailey* Fix Act." 144 Cong. Rec. S12670-02, S102670 (daily ed. Oct. 16, 1998) (statement of Sen. DeWine). Given this mass of evidence, there can be no dispute that Congress' goal in amending § 924(c) was to include possession of a firearm as an offense element.[9]

2. The congressional record reflects Congress' intent to treat brandishing and discharging as offense elements.

In addition, language in the record affirmatively suggests that Congress intended for brandishing and discharging to remain offense elements. The House Judiciary Committee discussed what the prosecution must prove to convict under the amended statute: "To sustain a *conviction* for brandishing or discharging a firearm, the government must demonstrate that the firearm was used 'during and in relation to' the commission of the federal crime of violence or drug trafficking crime." H.R. Rep. No. 105-344, at 12 (emphasis added). Additionally, the proposed amendment "defines the term 'brandish' for purposes of a § 924(c) *charge*." *Id.* (emphasis added). The Committee also stated "the test of whether the firearm intimidated or threatened [is] an objective one. Thus, unavailability of witnesses or disputes between witness

[9] The 104th Congress likewise pointed to the *Bailey* decision as the impetus to amend § 924(c). *See, e.g., Examining the Bailey Decision's Effect on Certain Prosecutions of Violent and Drug Trafficking Crimes: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong. 1-4 (1996) (Statements of Sens. DeWine & Helms, Members, Senate Committee on the Judiciary).

recollections would not preclude prosecutors from bringing a *charge* for brandishing a firearm under § 924(c)." *Id.* at 13 (emphasis added). The Court in *Jones* relied in part on the fact that the comments of certain Senators reflected an assumption that the amendment would establish elements to be proved at trial, highlighting one particular comment that referenced the term "convict[ion]." 526 U.S. at 238. The use of the terms "conviction" and "charge" in the congressional record here reflects a similar assumption: that brandishing and discharging must be charged in the indictment and proved at trial.

Moreover, Congress repeatedly discussed possessing, brandishing, and discharging together without ever suggesting that the first was an offense element while the latter two were sentencing factors. For example, Representative Norwood commented, "For any criminal in possession of a gun while committing a crime, this bill provides for a mandatory minimum sentence of 5 years in prison. For pulling that gun during a crime, 10 years. For firing it, 20 years." 142 Cong. Rec. E471-01, E471 (daily ed. Mar. 22, 1996) (statement of Rep. Norwood). *See also* 142 Cong. Rec. H2674-01, H2700 (daily ed. Mar. 22, 1996) (statement of Rep. Bereuter) ("this Member supports certain provisions of H.R. 125 that increase the mandatory minimum sentences for committing crimes while possessing, brandishing, or discharging a firearm"); 142 Cong. Rec. H2705-02, H2705 (daily ed. Mar. 22, 1996) (statement of Rep. Buyer) ("In this bill,. . . . [f]or the fact that he had possession of a firearm in the commission of that crime, even though he never pulled it, it is a mandatory minimum of 5 years. . . . If he pulls that weapon and he

brandishes that weapon . . . minimum 10 years. If in fact he discharges that firearm, 20 years.").

This uniform treatment of possessing, brandishing, and discharging continued into the 105th Congress. For example, Rep. McCollum described a bill as follows:

> Under this bill, the thug who uses a firearm in the commission of a crime receives a mandatory minimum sentence of 5 years above the sentence for the crime itself. If this same thug brandishes a weapon to incite fear in victims, it increases the sentence to 10 years. If a thug discharges the firearm, then the mandatory minimum is 20 years.

144 Cong. Rec. H530-02, H533 (daily ed. Feb. 24, 1998). *See also* H.R. Rep. No. 105-845, at 87 (1999) ("S. 191, as sent to the President, retains the 'possessing, brandishing, or discharging' language."); 144 Cong. Rec. S12670-02, S12670 (daily ed. Oct. 16, 1998) (statement of Sen. DeWine).

While Congress repeatedly used possession, brandishing, and discharging in the same breath, it never once suggested that these factors would be subject to different levels of proof, or that only a sentencing judge need make a finding of brandishing or discharging by a preponderance of the evidence. Given this similar treatment, it would strain logic to suggest Congress intended possession to be an element, and brandishing and discharging to be only sentencing factors.[10]

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[10] In addition to adding possession as an element of § 924(c), Congress also increased the penalties provided for by the statute. *See, e.g.*, 144 Cong. Rec. H10329-01, H10330 (daily ed. Oct. 9, 1998) (statement of Rep. Myrick) ("S. 191 clarifies that a criminal who possesses a gun while committing a violent crime or a drug crime will face a mandatory sentence. At the same time, the bill increases the mandatory sentence for such crimes."); H.R. Rep. No. 105-845, at 87. However, the fact that the amendment increased the *length* of the penalties does not show that Congress intended to create new sentencing *factors*. *See Jones*, 526 U.S. at 237-38 ("The Government points to several statements in the 1996 amendment's legislative history in which subsection (2) is described as providing a 'penalty enhancement'. . . . [We] find the quoted statements unimpressive."); *Castillo*, 530 U.S. at 129-30 (commenting that references in the congressional record to sentences did not suggest the amendment created sentencing factors when a preeminent feature of the amendment was the creation of a new mandatory prison term.); *Almendarez-Torres v. United States*, 523 U.S. 224, 234-35 (1998) (relying on the absence of any expression by Congress that it intended to create a new substantive offense to support the decision that the statute at issue created a new penalty provision rather than a substantive offense.).

C. Any Ambiguity In The Meaning Of § 924(c)(1)(A) Must Be Read In Petitioner's Favor.

The structure and history of § 924(c)(1)(A) leave little doubt that brandishing and discharging a firearm are offense elements that must be charged in the indictment and proved to a jury beyond a reasonable doubt. However, even if the statute were ambiguous, the rule of lenity and the doctrine of constitutional avoidance would require the ambiguity to be resolved in favor of Petitioner.

1. The Rule of Lenity.

The rule of lenity requires that "ambiguous criminal statute[s] . . . be construed in favor of the accused." *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994); *see also United States v. Granderson*, 511 U.S. 39, 54 (1994) ("where text, structure, and history fail to establish that the Government's position is unambiguously correct," the court should resolve the ambiguity in the defendant's favor). As the Court has recognized, this rule "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Albernaz v. United States*, 450 U.S. 333, 342 (1981). As a result, the Court "will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Id.* (internal quotations omitted).

In this case, lenity requires that brandishing and discharging be treated as elements of the offense, entitling Petitioner to the full panoply of constitutional protections before his sentence can be increased by forty to 100 percent.[11] The difference between the standards of reasonable doubt and a preponderance of the evidence

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[11] Treating brandishing as a sentencing factor does far more than deny a defendant his Fifth and Sixth Amendment rights. As the "criminal defendant is not entitled to trial-like procedural protections at a sentencing hearing," *United States v. Gatewood*, 230 F.3d 186, 191 (6th Cir. 2000) (en banc), *cert. denied*, 2002 WL 32559 (U.S. Jan. 14, 2002) (No. 00-7283), hearsay and other questionable evidence that would not be admissible at trial would be admissible at sentencing to show a defendant brandished a firearm.

can dramatically alter the outcome of a trial, especially in a case like this that is, as the district court admitted at sentencing, a "close call." Assuming that the Court is "genuinely uncertain as to Congress' intent" with regard to § 924(c)(1)(A), "the length and severity of [the] added mandatory sentence" that turns on a finding of brandishing or discharging "weigh[ ] in favor of treating such offense-related words as referring to an element." *Castillo*, 530 U.S. at 131; *see also Almendarez-Torres v. United States*, 523 U.S. 224, 271 (1998) (Scalia J., dissenting) (suggesting that the rule of lenity requires Congress to make its intentions "unambiguously clear" when it wishes for a fact to be treated as a sentencing factor rather than as an offense element).

2. The Doctrine of Constitutional Avoidance.

Like the rule of lenity, the doctrine of constitutional avoidance enables principled interpretation of ambiguous statutes. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909); *see also Jones*, 526 U.S. at 239. In this case, a construction of § 924(c) to the effect that brandishing and discharging a firearm are sentencing factors would raise grave and doubtful questions about the statute's constitutionality, including whether the statute violates the Fifth Amendment's due process and indictment provisions and the Sixth Amendment's jury trial and notice guarantees.

This Court held in *Apprendi v. United States*, 530 U.S. 466, 490 (2000), that it " 'is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.' " Although the Court has previously held that facts increasing the mandatory minimum sentence for an offense do not have to be proved beyond a reasonable doubt to a jury, *see McMillan v. Pennsylvania*, 477 U.S. 79 (1986), its opinion in *Apprendi* casts doubt on that ruling, as discussed in Part II below. Therefore, the Court should avoid the difficult constitutional questions posed by Respondent's construction of the statute and hold that brandishing and discharging are offense elements of § 924(c)(1)(A).[12]

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[12] As a practical matter, this reading of the statute does not necessitate unwieldy or complicated trials. The same or related evidence used to demonstrate that the defendant possessed a firearm would also likely show that the defendant brandished or discharged a firearm. *See Castillo*, 530 U.S. at 127-28. Nor does this interpretation of the statute harm defendants' interests by forcing them to offer inconsistent alternative arguments such as (1) I did not use or carry any firearm, and (2) even if I did, I didn't brandish it. *See id.* at 128. The prosecution's case under § 924(c)(1)(A) usually will involve "presenting a certain weapon (or weapons) to the jury and arguing that the defendant . . . used that weapon." *Id.* Indeed, in this case, Petitioner stipulated to possession of the gun, choosing only to contest whether the gun was used in connection with the drug sale. Even if a defendant did have to make this either-or argument, such a circumstance is no different than the frequent one faced by a defendant charged with lesser-included offenses (*i.e.* manslaughter occurred, but it was involuntary rather than voluntary).

II. THE CONSTITUTION REQUIRES THAT BRANDISHING A FIREARM BE TREATED AS AN OFFENSE ELEMENT UNDER § 924(c)(1)(A).

A. Any Fact That Alters Or Increases The Prescribed Range Of Penalties To Which A Defendant Is Exposed Must Be Charged In The Indictment, Submitted To A Jury, And Proved Beyond A Reasonable Doubt.

Even if § 924(c)(1)(A) unambiguously set forth sentencing factors and not offense elements, the Court still must reverse the ruling below. Regardless of whether Congress intended for brandishing and discharging to be sentencing factors, the Constitution requires that they be treated as offense elements that must be charged in the indictment and proved to a jury beyond a reasonable doubt.

Under the Due Process Clause of the Fifth Amendment, a defendant cannot be convicted of a criminal offense "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). In addition, the Fifth and Sixth Amendments entitle a defendant to notice of the charges against him and to trial before a jury. *See Almendarez-Torres v. United States*, 523 U.S. 224, 239 (1998). As the Court has long recognized, these requirements have a "vital role in our criminal procedure." *In re Winship*, 397 U.S. at 363. They reduce the risk that a defendant will be erroneously deprived of his liberty and stigmatized by a wrongful conviction, thus giving concrete meaning to the presumption of innocence

that is central to the Anglo-American legal tradition. *See Apprendi v. New Jersey*, 530 U.S. 466, 484 (2000).

In determining which facts are necessary to constitute a crime – and thus must be charged in the indictment and proved to a jury beyond a reasonable doubt – the Court has traditionally deferred to the elements of the offense as defined by the legislature. *See Patterson v. New York*, 432 U.S. 197, 211 n.12 (1977). But the Court has repeatedly emphasized that in defining those elements, "there are obviously constitutional limits beyond which the States may not go." *See id.* at 210; *see also Apprendi*, 530 U.S. at 486 (stating that "constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense"); and *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986) (noting that "of course, there are constitutional limits to the State's power in this regard").

In *Apprendi*, the Court elaborated upon those limits. There, the defendant was convicted of an assault that carried a maximum sentence of ten years in prison. 530 U.S. at 469-70. At sentencing, however, he received twelve years on the basis of New Jersey's hate crime statute, which authorized an increase in the maximum sentence to twenty years if the sentencing judge found beyond a preponderance of the evidence that the crime was motivated by racial bias. *Id.* at 470-71. Although New Jersey law expressly stated that racial bias was a sentencing factor, the defendant argued that he was entitled to have the issue submitted to a jury and proved beyond a reasonable doubt.

The Court agreed. Based on an analysis of both precedent and historical practice, it held that "[o]ther than

the fact of a prior conviction, any fact that increases . . . the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. In addition, the Court endorsed the statements of Justices Stevens and Scalia in their concurring opinions in *Jones*. *Id.* ("we endorse the statement of the rule set forth in the concurring opinions in [*Jones*]"). In that concurrence, Justice Scalia wrote that "it is unconstitutional to remove from the jury the assessment of facts that *alter* the congressionally prescribed *range of penalties* to which a criminal defendant is exposed." *Jones v. United States*, 526 U.S. 227, 253 (1999) (Scalia, J., concurring) (emphases added). Justice Stevens had expressed a similar view, writing that "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" must be submitted to a jury and "established by proof beyond a reasonable doubt." *Id.* at 252-53 (Stevens, J., concurring).

Like the hate-crime statute in *Apprendi*, the brandishing and discharging provisions of § 924(c)(1)(A) alter and increase the prescribed range of penalties to which a criminal defendant is exposed. Without a finding that a defendant brandished or discharged a firearm, the penalty range for a conviction under § 924(c)(1)(A) is five years to life in prison. With a finding that a defendant brandished a firearm, however, the penalty range increases to seven years to life in prison. And if the court finds that a defendant discharged a firearm, the range doubles to ten years to life in prison.

Although a finding that a defendant brandished or discharged a firearm does not increase the statutory maximum sentence, as did the finding in *Apprendi*, the

requirements of due process do not turn on this distinction. First, the concerns underlying the reasonable doubt requirement apply with equal force to factors that increase the statutory minimum sentence. Second, courts have historically treated any factor that altered a defendant's punishment as an element of the offense, without distinguishing between increases in maximums and minimums. And third, a distinction between increases in maximums and minimums would allow legislatures to circumvent the requirements of *Apprendi*.[13]

1. The concerns underlying the reasonable doubt requirement apply with equal force to findings that increase the statutory maximum sentence and to those that increase the mandatory minimum sentence.

As explained above, the reasonable doubt requirement serves two functions: It reduces the risk that a defendant will be erroneously deprived of liberty, and protects defendants from the stigma of a wrongful

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[13] An additional reason not to distinguish between increases in the statutory maximum and the statutory minimum is that in both situations, the legislature has singled out one factor and given it so much weight that it alone alters the sentencing range. When a legislature places such great emphasis on one of many components of the crime, the Constitution requires that it treat that component as an element of the offense. *See McMillan v. Pennsylvania*, 477 U.S. 79, 96 (1986) (Stevens, J., dissenting) ("Once a State defines a criminal offense, the Due Process Clause requires it to prove any component of the prohibited transaction that gives rise to both a special stigma and a special punishment beyond a reasonable doubt.").

conviction. *See Apprendi*, 530 U.S. at 484. Because a factor that increases the statutory maximum sentence heightens both the loss of liberty and the stigma attached to the offense, the Court has held that such factors must be proved to a jury beyond a reasonable doubt. As the Court explained in *Apprendi*:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not – at the moment the State is put to proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached.

Id. at 484.[14]

Just as an increase in the statutory maximum sentence heightens the loss of liberty and the stigma of conviction, so too does an increase in the mandatory minimum sentence. In this case, the charge against the Petitioner for carrying a firearm under § 924(c)(1)(A)

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[14] The Court expressed a similar point in *Mullaney v. Wilbur*:

> The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly.

421 U.S. 684, 698 (1975).

carried a sentence of five years to life. Thus, upon conviction, Petitioner faced at least a five-year loss of liberty and being stigmatized as someone who carried a firearm while dealing drugs. But when the judge found that he had brandished a firearm, Petitioner's mandatory loss of liberty increased to a minimum sentence of seven years in prison. In addition, instead of being stigmatized as someone who merely carried a firearm, he became stigmatized as a much more dangerous character who brandished a firearm.

A similar example is found in 21 U.S.C. § 848(a), which makes it a crime to engage in a continuing criminal enterprise involving the sale of drugs. Upon conviction of this offense, a defendant faces a sentence of twenty years to life in prison. But under 21 U.S.C. § 848(b), the mandatory minimum sentence increases to life in prison if a judge finds that the defendant was the leader or organizer of the enterprise and that a large quantity of drugs or money was involved. *See United States v. Smith*, 223 F.3d 554, 562-63 (7th Cir. 2000). Thus, a defendant who at the conclusion of his jury trial is eligible to receive a sentence of twenty years could suddenly be faced with the prospect of a mandatory life sentence, solely on the basis of facts that were not charged in the indictment, not submitted to a jury, and not proved beyond a reasonable doubt. This heightened loss of liberty is every bit as real as the loss of liberty in *Apprendi* and illustrates why increases in the mandatory minimum sentence are no less severe than increases in the statutory maximum sentence.

The Court has also acknowledged that an increase in a mandatory minimum sentence may have a more severe impact than an increase in the statutory maximum

sentence. *See Almendarez-Torres*, 523 U.S. at 244-45; *see also Apprendi*, 530 U.S. at 563 (Breyer, J., dissenting). Even with a finding that increases the statutory maximum sentence, a sentencing judge can still impose a sentence that is lower than the maximum; indeed she can impose a sentence within the initial statutory range. *Apprendi*, 530 U.S. at 470-71 (defendant received a twelve-year sentence, although the statutory maximum had increased to twenty years.) But when a finding increases the mandatory minimum sentence, the judge is bound by that new minimum and cannot impose a lesser sentence, even if she wants to. A mandatory minimum sentence thus "can eliminate a sentencing judge's discretion in its entirety. And it can produce unfairly disproportionate impacts on certain kinds of offenders." *See Almendarez-Torres*, 523 U.S. at 245 (citation omitted).

Increases in the mandatory minimum sentence do differ from increases in the statutory maximum sentence in one respect. In the latter situation, a defendant may receive a sentence longer than the initial statutory range, while in the former, he will always be sentenced within the prescribed range. But as this case demonstrates, that distinction is immaterial. Although Petitioner did not receive any sentence he could not theoretically have received otherwise, he was denied the opportunity to argue for, much less receive, a sentence lower than seven years. At the same time, the prosecution enjoyed a significant advantage it would not otherwise have had. It was "empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish." *Apprendi*, 530 U.S. at 522 (Thomas, J., concurring). This alteration of the rights and entitlements

stemming from the Petitioner's conviction implicates the core concerns of the due process clause and illustrates why any finding that increases the mandatory minimum sentence must be proved to a jury beyond a reasonable doubt.

Moreover, although it is possible that a defendant convicted under § 924(c)(1)(A) could receive a seven-year sentence even without a finding that he brandished a firearm, it is by no means certain. The sentencing guidelines for § 924(c)(1)(A) instruct judges to impose the minimum sentence required by the statute. *See U.S. Sentencing Guidelines Manual* § 2K2.4(a)(2) (2001). Judges may depart upward from this recommendation, but only if they articulate a legally permissible justification. And statistics show that judges almost never depart upward from the recommended range. *See* U.S. Sentencing Comm'n, *Federal Sentencing Statistics for Fiscal Year 2000*, at tbl. 8 (2001) (showing that judges departed upward in less than one percent of cases). In addition, as Justice Thomas and others have pointed out, "it is likely that the change in the range available to the judge affects his choice of sentence." *Apprendi*, 530 U.S. at 522 (Thomas, J., concurring); *see also Hobbs v. State*, 44 Tex. 353, 1875 WL 7696, at *2 (1875) (noting that it is "impossible to say . . . that the erroneous charge of the court may not have had some weight in leading the jury to" impose the sentence that it did); *Searcy v. State*, 1 Tex. App. 440, 1876 WL 9086, at *3 (1876) (same). Thus, the judge's finding that Petitioner brandished a firearm had a very real effect on the sentence he ultimately received.

2. Historically, courts treated all factors that altered a defendant's punishment as elements of the offense.

Not only do the underlying concerns of the reasonable doubt requirement apply with equal force to factors that increase the statutory minimum sentence and to those that increase the statutory maximum sentence, but history provides no support for distinguishing between the two. As Justice Thomas demonstrated in his *Apprendi* concurrence, courts throughout the Nineteenth Century held that the elements of an offense included any "fact that [was] by law the basis for imposing or increasing punishment." *See Apprendi*, 530 U.S. at 502.

In *Hobbs v. State*, 44 Tex. 353, 1875 WL 7696 (1875), for instance, the defendant was indicted for a burglary that was punishable by two to five years in prison. A separate statute allowed the sentence to be doubled if the burglary was committed with an excessive degree of force. At trial, the judge instructed the jury to sentence the defendant to two to ten years if it found the extra level of force, and the jury sentenced him to three. But the Texas Supreme Court reversed the sentence because the indictment had not alleged the extra degree of force. Even though the defendant was sentenced within the range authorized by the indictment, the court thought it "impossible to say . . . that the erroneous charge of the court may not have had some weight in leading the jury to affix three years imprisonment instead of the minimum two years." *Id.* at *2.

Numerous other courts ruled that any fact relevant to the defendant's sentence is an element of the offense that

must be charged in the indictment. For example, in *Hope v. Commonwealth*, 50 Mass. 134, 1845 WL 4043 (1845), the Supreme Judicial Court of Massachusetts overturned a defendant's conviction for larceny because the value of the individual items stolen had not been charged in the indictment. Under Massachusetts law, the court pointed out, punishment varied with value. Therefore, the "value of the property alleged to be stolen must be set forth in the indictment." *Id.* at *2; *see also Commonwealth v. Smith*, 1 Mass. 245, 1804 WL 709, at *1-*2 (1804) (same); *Ritchey v. State*, 7 Blackf. 168, 1844 WL 2999 (Ind. 1844) (indictment for arson must allege the value of the property destroyed because punishment varies with value); *Brightwell v. State*, 41 Ga. 482, 1871 WL 2314, at *1 (1871) ("When the law prescribes a different punishment for different phases of the same crime, there is good reason for requiring the indictment to specify which of the phases the prisoner is charged with."); *United States v. Reese*, 92 U.S. 214, 232 (1875) ("[t]he indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted").

In many cases, courts confronted statutes where "the aggravating fact raised the whole range – both top and bottom." *See, e.g., Garcia v. State*, 19 Tex. App. 389, 1885 WL 6922, at *3 (1885); *Johnson v. State*, 55 N.Y. 512, 1874 WL 11015 (1874); *Lacy v. State*, 15 Wis. 13, 1862 WL 951, *2-*3 (1862). But as Justice Thomas pointed out, "[t]hose courts, in holding that such a fact was an element, did not bother with any distinction between changes in the maximum and the minimum. What mattered was simply the overall increase in the punishment provided by law." *Apprendi*, 530 U.S. at 522 (Thomas, J., concurring).

The leading criminal procedure treatise of the Nineteenth Century confirms that all facts relevant to punishment were regarded as elements. *See* 1 J. Bishop, *Law of Criminal Procedure* 50 (2d ed. 1872). In discussing the requirement that an indictment must allege all facts necessary to constitute the crime, Bishop explained that this included "whatever is in law essential to the punishment sought to be inflicted." *Id.* (capitalization omitted). He also noted that "the indictment must . . . contain an averment of every particular thing which enters into the punishment," and that a crime consists of the whole of "the wrong upon which the punishment is based." *Id.* at 53, 330. And to make clear that even facts that fell short of increasing the statutory maximum sentence were regarded as elements, Bishop stated that where a statute created an aggravated offense carrying a "punishment [ ] heavier than . . . *or differing from*" the non-aggravated offense, the "aggravating matter is required to be set out in the indictment." *Id.* at 52 (emphasis added); *see also id.* at 51 ("it is, in reason, not lawful and not just to visit [a man] . . . with any punishment exceeding in amount, or in kind *differing* from, what the law has set down as the penalty for the particular acts alleged") (emphasis added).

3. Distinguishing between factors that increase statutory maximum sentences and mandatory minimum sentences would allow legislatures to circumvent *Apprendi*.

Finally, if the Court limits its holding in *Apprendi* to factors that increase the statutory maximum sentence, it will leave legislatures a sizeable loophole through which

to evade the reasonable doubt requirement. In order to avoid the requirement that no sentencing factor increase the defendant's penalty beyond the statutory maximum, legislatures would need only raise all statutory maximum sentences to life in prison and then give judges guided discretion with respect to a few specially selected factors. As the dissent in *Apprendi* pointed out, this possibility could render *Apprendi* nothing more than a meaningless formalism. *Apprendi*, 530 U.S. at 539. (O'Connor, J., dissenting).

The majority in *Apprendi* responded to this concern by stating that "structural democratic constraints exist to discourage legislatures from enacting penal statutes that expose every defendant convicted of, for example, weapons possession, to a maximum sentence exceeding that which is, in the legislature's judgment, generally proportional to the crime." *Id.* at 490 n.16 (emphasis omitted). Structural democratic constraints, however, can be relied upon only when the majority's interests are aligned with the interests of the minority whose rights are at risk. *See* Joseph L. Hoffman, *Apprendi v. New Jersey: Back to the Future?*, 38 Am. Crim. L. Rev. 255, 274-79 (2001). Given that only a small majority of Americans would ever be prosecuted under § 924(c)(1)(A), legislators have little incentive to consider the consequences of exposing defendants to a maximum sentence of life in prison. Similarly, the rest of the public would have scant reason to closely scrutinize the enactment of such a law. *See id.* (noting that "criminals generally do not have effective lobbyists.")

Experience also indicates that structural democratic constraints do not deter legislators from rewriting criminal statutes to evade the reasonable doubt requirement. According to a recent study, after several of the Court's major decisions, state legislatures have identified ways in which they could evade procedural guarantees through changes in substantive criminal law. *See* Nancy J. King & Susan R. Klein, *Essential Elements*, 54 Vand. L. Rev. 1467, 1489-92 (2001). For instance, in the wake of the Court's ruling that defendants can be required to prove insanity beyond a reasonable doubt, *see Leland v. Oregon*, 343 U.S. 790 (1952), fifteen states relieved the prosecution of the burden of proving that the defendant was sane when he committed the offense. *See* King & Klein, *supra*, at 1491-92. Nine states relieved the prosecution of the burden of proving the absence of heat of passion in the aftermath of *Patterson*, 432 at 211 n.12. King & Klein, *supra*, at 1492. And in response to *McMillan*, five states instructed judges to impose mandatory minimum sentences when they found, by a preponderance of evidence, that the defendant possessed a firearm while committing a felony offense. *Id.* Given this record, the Court should not rely on structural democratic constraints now. *See also* Kyron Huigens, *Rethinking the Penalty Phase*, 32 Ariz. St. L.J. 1195, 1282 n.266 (2000) (concluding that reliance on structural democratic restraints "has had a predictable result: the legislatures, particularly Congress, have run roughshod over the Court's trust.")

In sum, the Court should not limit the principles it announced in *Apprendi* to factors that increase a defendant's penalty beyond the statutory maximum. Instead, it should extend that decision to its logical conclusion and

hold that any fact that alters the prescribed range of penalties – by raising either the minimum or maximum – must be charged in the indictment, submitted to a jury, and established by proof beyond a reasonable doubt.[15]

B. The Court's Decision In *McMillan* Has Been Undermined By Developments In The Law And A New Understanding Of The Historical Treatment Of Offense Elements.

In extending *Apprendi* to its logical conclusion, the Court must, and should, overrule *McMillan*. In that case, the Court upheld a Pennsylvania statute that required a judge to impose a mandatory minimum sentence of five

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[15] In adopting this rule, the Court need not address the constitutionality of the United States Sentencing Guidelines. The Guidelines channel a judge's discretion in deciding upon a sentence within the prescribed statutory range, but they do not eliminate judicial discretion. A judge who thinks the sentence recommended by the guideline range is too severe may depart downward and impose a sentence at the bottom of the statutory range. Indeed, 34 percent of all defendants sentenced under the guidelines in 2000 received a sentence lower than the recommended range. *See* U.S. Sentencing Comm'n., *supra*, at tbl. 8.

A mandatory minimum, by contrast, eliminates all judicial discretion to depart downward. Once a judge finds the existence of facts that trigger the mandatory minimum, the prescribed sentencing range shifts, increasing the prosecution's entitlement and eliminating the defendant's opportunity to obtain a lower sentence. It is this alteration of the rights and entitlements stemming from the defendant's conviction that violates due process and that distinguishes increases in statutory mandatory minimum sentences from the Sentencing Guidelines.

years in prison if she found by a preponderance of evidence that a defendant "visibly possessed a weapon" while committing a felony. Although several members of this Court have argued that *McMillan* was wrongly decided, *see Apprendi*, 530 U.S. at 521-22 (Thomas, J., concurring); *Jones*, 526 U.S. at 253 (Stevens, J., concurring), the Court in *Apprendi* "reserve[d] for another day the question whether *stare decisis* considerations preclude reconsideration" of that decision. *See* 530 U.S. at 487 n.13. If the Court rejects Petitioner's statutory construction argument in Part I, then this case squarely presents the issue of *McMillan's* continuing validity, and the Court should now address that question.

Like any decision of the Court, *McMillan* is undergirded by stare decisis. However, "*[s]tare decisis* is not . . . a universal, inexorable command." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting), *overruled on other grounds, Helvering v. Bankline Oil Co.*, 303 U.S. 362 (1938). It is a flexible rule, subject to "prudential and pragmatic considerations" that focus on the workability and continuing validity of the underlying decision. *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992). In this case, those considerations argue in favor of overruling *McMillan*.

First and foremost, the Court's recent decisions cast serious doubt on the continuing validity of *McMillan*. Here, "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Casey*, 505 U.S. at 855; *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 173-74 (1989). In both *Jones* and *Apprendi*, the Court rejected *McMillan's* premise that factors relevant only to sentencing need not

be proved to a jury beyond a reasonable doubt. *See Jones*, 526 U.S. at 248 ("removing [from the jury] control over facts determining a statutory sentencing range would . . . raise a genuine Sixth Amendment issue not yet settled"); *Apprendi*, 530 U.S. at 490 (" '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.' ") (alteration in the original). Indeed, as the dissenters in *Apprendi* acknowledged, the Court's decision in that case all but overruled *McMillan*.[16] *See Apprendi*, 530 U.S. at 533 (O'Connor, J. dissenting) (noting that "[t]he essential holding of *McMillan* conflicts with at least two of the several formulations the Court gives to the rule it announces today").

Second, the law relating to sentencing factors and offense elements has long been the subject of conflicting opinions. Each of the Court's recent decisions in this area has been "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions," a circumstance that weakens the case for adherence to precedent. *Payne v. Tennessee*, 501 U.S. 808, 828-29 (1991). Moreover, in each of these decisions, the "narrow" majority and the "spirited" dissent were at loggerheads over the proper interpretation of the decisions that came before. *See, e.g., Apprendi*, 530 U.S. 466

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[16] The Court itself seems to have recognized this as well. Among the numerous cases that the Court has remanded for reconsideration in light of *Apprendi*, many have involved increases in the statutory minimum, not the statutory maximum. *See United States v. Norris*, 143 F. Supp. 2d 243, 248 (E.D.N.Y. 2001) (listing cases).

(2000) (5-4 decision); *id.* at 531-38 (O'Connor, J., dissenting) (contending that majority opinion conflicts with *Almendarez-Torres*, *Patterson*, *McMillan*, and *Walton v. Arizona*, 497 U.S. 639 (1990)); *Jones*, 526 U.S. 227 (1999) (5-4 decision); *id.* at 254, 266-70 (Kennedy, J., dissenting) (contending that majority opinion misreads *Almendarez-Torres* and *McMillan*); *Monge v. California*, 524 U.S. 721 (1998) (5-4 decision); *id.* at 741 (Scalia, J., dissenting) (characterizing *Almendarez-Torres* as "a grave constitutional error affecting the most fundamental of rights"); *Almendarez-Torres*, 523 U.S. 224 (1998) (5-4 decision); *id.* at 253-56 (Scalia, J., dissenting) (contending that the majority "ignore[s] or distort[s] the analysis of *McMillan*); *McMillan*, 477 U.S. 79 (1986) (5-4 decision); *id.* at 98-99 (Stevens, J., dissenting) (contending that the majority misreads *Patterson* and *In re Winship*); *Patterson v. New York*, 432 U.S. 197 (1977) (5-3 decision); *id.* at 221-24 (Powell, J., dissenting) (challenging the majority's reading of *Mullaney*; contending that its interpretation of *Mullaney* "clos[es] its eyes to the constitutional values for which *Winship* stands").

Third, the force of precedent is lessened where "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 854. This principle permits the Court "to bring its opinions into agreement with experience and with facts newly ascertained." *Burnet*, 285 U.S. at 412 (Brandeis, J., dissenting); *see also* B. Cardozo, *The Nature of the Judicial Process* 151 (1921). Here, further examination of the common law understanding of offense elements has, at a minimum, caused the Court to view differently the scope of the Fifth and Sixth Amendment

protections. *See Apprendi*, 530 U.S. at 477-82 (observing that at common law, "just as the circumstances of the crime and the intent of the defendant . . . were often essential elements to be alleged in the indictment, so too were the circumstances mandating a particular punishment"); *id.* at 501-18 (Thomas, J., concurring) (demonstrating that "the common law rule would cover the *McMillan* situation of a mandatory minimum sentence"). This examination has revealed that at common law, facts that changed the sentencing *range* – maximum or minimum – were regarded as elements of the offense that must be charged in the indictment and submitted to the jury. Given that the constitutional analysis of offense elements depends heavily on historical practice, *see Jones*, 526 U.S. at 234-35 (noting the need to consider the "traditional treatment of certain categories of important facts"); *Almendarez-Torres*, 523 U.S. at 243-44 (considering the historical treatment of recidivism), this new evidence provides a strong argument for overruling *McMillan*.

Finally, *McMillan* involves a constitutional rule, and this Court has long recognized that the force of precedent in such cases is weaker than in cases involving statutory construction. *See McLean Credit Union*, 491 at 172-73; *Burnet*, 285 U.S. at 406-07 (Brandeis, J., dissenting). *McMillan's* constitutional holding, never an uncontroverted decision in this area of deeply conflicted opinions from the Court, is no longer valid in light of *Jones* and *Apprendi*, and the Court's further examination of the common law understanding of offense elements. Facts selected by the legislature to trigger an increase in the statutory mandatory minimum sentence should not be

treated as mere sentencing factors, but rather, should be treated as elements of the offense.

C. Even If *McMillan* Remains Good Law, The Court Should Reverse Because The Amendments To § 924(c)(1) Raise The Specter Of Congress Restructuring Crimes To Evade The Requirements Of *Winship*.

Even if *McMillan* stands, the Court should reverse the ruling below because any construction of § 924(c)(1)(A) that relegates brandishing and discharging to mere sentencing factors violates the principle that a legislative body may not restructure existing crimes to evade the requirements stated in *In re Winship*, 397 U.S. at 364.

In this area of conflicting opinions from the Court, one principle has remained constant: although courts usually defer to a legislature's definition of an offense, legislatures cannot merely re-label offense elements as sentencing factors to evade constitutional due process requirements. In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), for instance, the Court struck down a Maine statute that relieved the prosecution of the burden of proving malice aforethought in order to obtain a murder conviction. Although Maine had not made malice an element of the crime of murder, the Court ruled that this fact alone was not dispositive:

> [I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be

> necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.

Id. at 698.

The Court reaffirmed this principle in *McMillan*. In ruling that the Pennsylvania statute at issue did not violate the Constitution, the Court observed that "the specter . . . of States restructuring existing crimes in order to 'evade' the commands of *Winship* just does not appear in this case." 477 U.S. at 89. Pennsylvania, the Court noted, "did not change the definition of any existing offense," but instead took a factor that had always been relevant to punishment and dictated the precise weight it would be given. *See id.; see also Apprendi*, 530 U.S. at 552-53 (O'Connor J., dissenting) (noting that the New Jersey statute "gives no impression of having been enacted to evade the constitutional requirements that attach when a State makes a fact an element of the charged offense. For example, New Jersey did not take what had previously been an element of the weapons possession offense and transform it into a sentencing factor."); *Almendarez-Torres*, 523 U.S. at 246 (concluding that "[t]he relevant statutory provisions do not change a pre-existing definition of a well-established crime, nor is there any more reason here, than in *McMillan*, to think Congress intended to 'evade' the Constitution, either by 'presuming' guilt or 'restructuring' the elements of an offense").

Unlike *McMillan*, *Apprendi*, and *Almendarez-Torres*, this case raises the specter of a legislature restructuring existing crimes in order to evade the commands of *Winship*. As explained in Part I of Petitioner's brief, prior to

the 1998 amendments, brandishing and discharging were treated as offense elements in § 924(c)(1). Petitioner argues that because Congress did not express any intent to convert brandishing and discharging into sentencing factors, they should be treated as offense elements under the amended statute as well. If the Court disagrees, then Congress has taken what were traditionally treated as offense elements and turned them into penalty enhancements that only have to be proved beyond a preponderance of the evidence. At the same time, Congress has raised the maximum penalty for using, carrying, or possessing a firearm from five years to life in prison, thereby ensuring that the punishment attached to the newly created penalty enhancements could never exceed the statutory maximum sentence for the underlying offense.

This situation is precisely what the Court warned of in *Mullaney*, and what *Winship* and *McMillan* forbid. Congress has "redefine[d] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." *Mullaney*, 421 U.S. at 698. Nowhere in its discussions of § 924(c)(1)(A) did Congress explain why it made this change. Nor did Congress explain why it increased the statutory maximum sentence for the underlying offense from five years to life in prison. In the absence of such explanations, the amendments to § 924(c)(1)(A) violate the commands of *Winship*. As a result, due process requires that brandishing and discharging a firearm be treated as elements of the offense that must be charged in the indictment and proved to a jury beyond a reasonable doubt.

CONCLUSION

For all these reasons, Petitioner respectfully requests that the decision of the Fourth Circuit Court of Appeals be reversed, Petitioner's seven-year term of imprisonment be overturned, and this case be remanded to the district court for resentencing.

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